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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Questions for Review.

1. In enforcing the NLRB's Order requiring a trade association to disclose to certain Unions the names and addresses of its "open shop" or "non-union" members, with which the Unions had no collective bargaining relationship, did the Court of Appeals fail to properly weigh the employers' interests in the confidentiality of such information against the Unions' desire to gain such information to police their collective bargaining relationship with the association's unionized members, in contravention of this Court's holding in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 99 S.Ct. 1123 (1979)?

2. Did the Court of Appeals apply a standard of "possible" relevance, rather than "probable" relevance to the Unions' demand for the names and addresses of the non-union members of a trade association, in contravention of this Court's holding in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 87 S.Ct. 565 (1967)?

3. In ordering the blanket disclosure of the names and addresses of all open shop members of a trade association, including those which the Unions did *not* suspect of being "alter egos" of unionized firms, did the Court of Appeals require the association to disclose more information than was reasonably necessary to enable the Unions to carry out their role as collective bargaining representatives?

4. In passing upon the validity of the NLRB's Order requiring the disclosure of the names and addresses of all non-union members of a trade association, was the Court of Appeals obligated to take into account the possible ulterior motives of the Unions in requesting this information, including the Unions' apparent desire to "top-down" organize all non-union contractors?

5. Did the Court of Appeals fail to properly weigh the Administrative Law Judge's contrary findings regarding the motives of the Unions in seeking the names of non-union members of the trade associations?

Parties to This Action.

The parties to this action are:

1. Associated General Contractors of California, Inc., a nonprofit trade association;

2. The National Labor Relations Board;

3. The 46 Northern California Counties Conference Board, United Brotherhood of Carpenters and Joiners of America; and

4. The Northern California District Council of Laborers, Laborers International Union of North America.

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IN THE

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October Term, 1980

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Associated General Contractors of California, Inc. respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 6, 1981.

I.

OPINIONS BELOW.

The Opinion of the Court of Appeals (Appendix A, *infra*) is reported at 633 F.2d 766. That Court's Order denying petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc (Appendix B, *infra*) was filed on December 22, 1980, and is not reported. The Decision and Order of the National Labor Relations Board (Appendix C, *infra*) was filed on June 8, 1979 and is reported at 242 NLRB No.

124. The Decision and Order of the Administrative Law Judge (Appendix D, *infra*) was filed on April 7, 1978, and is not officially reported.

II.

JURISDICTION.

The Opinion of the Court of Appeals for the Ninth Circuit was filed on October 16, 1980. A timely Petition for Rehearing and Suggestion En Banc was filed, and was denied on December 22, 1980.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Sec. 1254(1).

This Petition is timely filed with this Court under the provisions of 28 U.S.C. Sec. 2101(c).

III.

STATUTORY PROVISIONS.

The relevant statutory provisions are:

1. National Labor Relations Act, Sec. 10(e);
2. National Labor Relations Act, Sec. 8(a)(1);
3. National Labor Relations Act, Sec. 8(a)(5).

These statutory provisions are reproduced at Appendix E, *infra*.

IV.

STATEMENT OF THE CASE.

A. Overview.

This case arises from charges filed with the National Labor Relations Board by the 46 Northern California Counties Conference Board, United Brotherhood of Carpenters and Joiners of America (''the Carpenters Union''), and the Northern California District Council of Laborers, Laborers

International Union of North America ("the Laborers Union").[1]

The charges filed by the Unions allege, generally, that Associated General Contractors of California, Inc. ("AGC") violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("the Act") by refusing to provide the Unions with a list of all AGC members, including Open Shop and Open Shop Specialty members having no collective bargaining relationship with the Unions. The charges were heard by an Administrative Law Judge in January, 1978. On April 7, 1978, the Administrative Law Judge issued a proposed decision dismissing the charges in their entirety.

A three-member panel of the Board subsequently issued a Decision and Order on June 8, 1979. The Board's Decision and Order essentially reverse all of the factual and legal findings of the Administrative Law Judge. The Decision of the Board held that AGC violated Sections 8(a)(1) and 8(a)(5) of the Act by refusing to furnish the Unions with a roster of all members, including Open Shop and Open Shop Specialty members.[2] The Board's Order directed that AGC furnish such a roster upon request, and provide periodic supplements.

The Board sought enforcement of its Order in the U.S. Court of Appeals for the Ninth Circuit.

That Court ordered enforcement of the portion of the Board's Order requiring the disclosure of AGC's roster of Open Shop and Open Shop Specialty members, and denied enforcement of the Board's Order insofar as it related to other membership categories.

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[1]The Carpenters Union and Laborers Union are hereinafter referred to collectively as "the Unions."

[2]Open Shop and Open Shop Specialty members are those without any jobsite collective bargaining agreements with any Union.

B. The Parties.

AGC is a non-profit trade association which performs services for contractors engaged in heavy, highway and commercial construction. It engages in a variety of activities designed to create a favorable climate for its members' work in the construction industry, and acts as a liaison with various public and private agencies.

AGC also performs certain labor relations functions for certain categories of its members. Regular, Specialty and Joint Venture members of AGC are required, at the time they become members, to designate AGC as their agent to negotiate collective bargaining agreements with certain "basic craft" unions,[3] including the Laborers Union and the Carpenters Union.

The Carpenters Union and the Laborers Union have had a continuous collective bargaining relationship with AGC and its predecessor entities for over 25 years. The Unions and AGC have negotiated a series of "Master Labor Agreements" which govern the employment of covered carpentry personnel in Northern California. The most recent Master Labor Agreements (separately negotiated with each Union) are the 1974-1977 and 1977-1980 agreements.

C. The Development of the Open Shop Membership Category.

In 1971, as a result of a request from Associated General Contractors of America, Inc., AGC began exploring the possibility of creating an "Open Shop" membership cate-

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[3]The "basic craft" unions are: (1) United Brotherhood of Carpenters and Joiners of America; (2) Operative Plasterers and Cement Masons International Association of the United States and Canada; (3) International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; (4) International Association of Bridge, Structural and Ornamental Ironworkers; (5) International Union of Operating Engineers; and (6) Laborers International Union of North America.

gory. There was an apparent national growth of interest in open shop construction, and it was felt that AGC would be depriving some portion of the construction community of its services were it to decline to accept open shop contractors as members. It would also lose the dues revenue to be derived from open shop members to competing associations.

In April, 1971, the Board of Directors of AGC passed a resolution approving the creation of a new category of membership for Open Shop members. This resolution was subsequently approved by a plebiscite of AGC members.

The Bylaws of AGC were amended to provide for this new membership category. In order to qualify for Open Shop Membership, each prospective member was required to have no active collective bargaining agreements covering jobsite employees with any construction union. The Bylaws provided that Open Shop members would not confer any collective bargaining authority upon AGC to act in their behalf, and would not become bound to the Master Labor Agreements with the six basic construction crafts.

AGC also created an "Open Shop Specialty" membership category, consisting of subcontractors and specialty contractors other than general contractors. Like Open Shop members, the Open Shop Specialty members confer no collective bargaining authority upon AGC, and are not bound to the Master Labor Agreements by virtue of their membership in AGC.

No Regular, Specialty or Joint Venture member of AGC may become an Open Shop or Open Shop Specialty member during the life of the Master Labor Agreements.

D. Notice to the Unions of Changes in Regular, Specialty and Joint Venture Members.

AGC responds to inquiries from the Unions regarding its Regular, Specialty and Joint Venture members. The Unions

are automatically notified of additions and deletions in the membership categories which AGC represents for collective bargaining purposes, and of pending applications for Regular and Specialty Membership; the Unions are also notified of resignations and expulsions and changes of name or style.

E. The Unions' Reaction to the Creation of the Open Shop Membership Category.

The Unions made it clear, at the hearing before the Administrative Law Judge, that they are totally opposed to AGC's acceptance of Open Shop members. Mr. Van Bourg, the attorney for both the Carpenters and Laborers, testified that during a discussion with representatives of AGC in 1977 he had "clearly stated that the Open Shop impetus of the AGC was something the Unions could not live with . . . I advised them I felt their Open Shop impetus was, in my opinion, a violation of the law, an unfair labor practice."[4] Mr. Van Bourg also stated that, in his opinion: "They have a conflict of interest. It is a clear-cut legal conflict of interest."

The Unions have taken a number of steps to attempt to discourage AGC from permitting Open Shop Membership. In February, 1975, Van Bourg filed a lawsuit in the U.S. District Court for the Northern District of California on behalf of the Carpenters Union naming AGC and a large number of its members as defendants, and charging them with encouraging open shop operation in alleged violation of federal and California antitrust laws.

The Unions have also sent uninvited representatives to listen in on seminars given by AGC for its members regarding open shop operation. Mr. Null, a representative of the Carpenters Union, testified that the Carpenters have

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[4]No legal authority has ever been cited by the Unions for this assertion.

demanded that AGC stop giving such seminars. He also testified that he told Union attorney Van Bourg to try to stop the promulgation of an apprenticeship program to train apprentices to be used by open shop contractors. Finally, Mr. Null testified that Mr. Van Bourg was instructed to try to obtain language in the Master Labor Agreements which would automatically bind every contractor joining AGC to the Master Labor Agreements, thus making it impossible for any open shop member to join AGC without forfeiting non-union status.[5]

F. The Unions' Demand for the Names of Open Shop Members of AGC.

In late 1976 and early 1977, Union attorney Van Bourg sent three letters to the AGC demanding a list of all AGC members, assertedly for use by the Laborers and Carpenters in forthcoming collective bargaining negotiations.[6] Subsequently, in early 1977, Van Bourg met with Richard Munn of AGC to discuss the negotiations to be held that year. He again requested a full roster of all AGC members, including the Open Shop members. Mr. Munn declined to furnish a list of the Open Shop and Open Shop Specialty members.[7]

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[5]The Unions' great concern with the growth of open shop construction contracting is central to this case, since the critical issue before the Court is whether the Unions' demand for the names of AGC's open shop members is made to assist the Unions in their role as collective bargaining representatives, or whether its purpose is to obtain information to assist the Unions in attacking open shop construction contractors generally.

[6]Significantly, negotiations were completed in 1977, to the apparent satisfaction of the parties, without benefit of a list of Open Shop members.

[7]It should be noted that Mr. Van Bourg's request for a "full roster" was simply a euphemistic way of saying he wished the names of the Open Shop and Open Shop Specialty members. The Unions have never expressed any serious interest in the identities of the Affiliate and Honorary members of AGC.

At various times, the Unions have advanced the following reasons for wishing a list of the Open Shop and Open Shop Specialty members:

(a) The Unions claim the list is necessary in order to "enforce the Master Labor Agreement." However, no specific violations of the Master Labor Agreements were demonstrated in the proceedings below; nor has any explanation been given of how the roster of members *not* bound to the Master Labor Agreement would assist in the Agreement's enforcement.

(b) Mr. Van Bourg has stated that he is afraid of "runaway contractors" who might "transfer" from Regular Membership in AGC to Open Shop Membership. No instances of such "transfers" were shown in the proceedings below. "Transfers" to open shop status are not permitted during the term of the Master Labor Agreements.

(c) The Unions claim they are fearful that some contractors may change their names, or operate under more than one license. No members of AGC who had done this have been identified in these proceedings.

(d) The Unions have also expressed concern about so-called "double-breasted" construction operations.[8] Of course, "double-breasted" operation is not, in itself, illegal; as the Board itself has found, the mere existence of common elements of ownership does not mean that the "open shop" business is bound to follow the labor practices of the "union" business. (See *Frank N. Smith Associates,* 194 N.L.R.B. 212 (1971).)

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[8]The term "double-breasted" operation is loosely used to refer to two businesses which have some elements of common ownership, but which have different labor relations programs. (Generally, one business is "union" while the other business is "open shop.")

G. The Administrative Law Judge Dismisses the Complaint.

The Administrative Law Judge found that AGC's decision not to furnish a list of its Open Shop and Open Shop Specialty members to the Unions did not constitute a violation of Sections 8(a)(5) and 8(a)(1) of the Act. He held that "both Carpenters and Laborers are essentially unimpeded in their function as parties to construction industry contracts that relate only to Respondents' major traditional arm [the Regular, Specialty and Joint Venture members] . . . . In the last analysis, the case becomes one of whether non-union construction firms may purchase the administrative and promotional services of an industry support mechanism [AGC] without further entanglements stemming from a separately existing labor relations function. I believe a negative answer would overreach to the detriment of basic Section 7 rights as preserved to employees." (Appendix "D," *infra*.)

The Administrative Law Judge found that mere membership in AGC did not constitute a basis for disclosure of the names of Open Shop members:

> "The essential vice in General Counsel's case here is that Open Shop members are specifically not bound to contracts, nor are they within the intendment of a membership listing when done expressly not for collective bargaining purposes. It would distort common meaning of Association bargaining practices were the Open Shop firms to be considered to be within the Laborers' bargaining unit when a sophisticated agency relationship is rooted just oppositely." (Appendix "D," *infra*.)

The Administrative Law Judge apparently believed the Unions sought the list of Open Shop members to assist them

in combating the Open Shop movement generally, rather than in policing the existing collective bargaining agreements.

H. The Board Reverses the Administrative Law Judge's Decision.

The Board reversed the determination of the Administrative Law Judge, finding that the Unions were entitled to "Respondent's full membership roster, including the portion which contains the names and addresses of its Open Shop and Open Shop Specialty members."

The Board held that "there was no justification for the Administrative Law Judge's conjecture that the Unions' underlying purpose was to facilitate the organizing of non-union companies." Moreover, the Board held that even if the information might be used for such purposes, it made no difference if the Unions' request for information was also "for a proper and legitimate purpose." (Appendix "C," *infra*.)

V.

REASONS THE WRIT SHOULD BE GRANTED.

A. This Case Presents a Troublesome and Potentially Recurrent Problem Not Previously Considered by This Court.

In the last ten years, there has been a substantial increase in the amount of "open shop" construction work performed in the United States, due largely to the dramatic rise in the wages and benefits paid to unionized construction workers. The Administrative Law Judge who heard this case took judicial notice that 35 percent of the members of Associated General Contractors of America (AGC's parent organization) operate on an open shop basis. The Administrative Law Judge's Opinion cites evidence that open shop con-

struction now constitutes a "majority of all construction in the U.S." (Appendix "D," *infra*).

Because of the dramatic increase in open shop construction, many trade associations which collectively bargain on behalf of their unionized members now permit open shop contractors to join, without requiring such contractors to confer collective bargaining authority upon the trade association they are joining.

The presence of open shop construction contractors in such trade associations has given rise to a new and troublesome problem in labor relations. Each such association which acts as a collective bargaining representative of its unionized members is, without doubt, obligated to furnish the unions with which it collectively bargains with the names, addresses, and other relevant information concerning the unionized contractors on whose behalf it bargains. The presence of open shop contractors within such associations has given rise to demands that the trade associations reveal information about their non-union members, as well.

There is a substantial risk that unions will utilize their collective bargaining relationship with trade associations as a lever to obtain information about the non-union members of such associations. That is what has happened in this case. In the proceedings below, the Unions insisted that they wished to obtain the names of all open shop members of AGC in order to assist them in policing their collective bargaining agreements. However, no concrete explanation of how such information would assist the Unions in policing the collective bargaining agreements was given.

AGC has indicated that it will produce relevant information about particular "open shop" members where there is some reasonable indication that such members are "alter egos" or improper "double-breasts" of unionized compa-

nies. But the blanket disclosure of the names and addresses of *all* non-union members of AGC, as ordered by the NLRB and the Court of Appeals, creates a substantial risk that the open shop membership list will simply be used by the Unions as an organizational tool to attack all of AGC's open shop members.

AGC concedes that it has an obligation to furnish the Unions with information necessary to performance of their role as collective bargaining representative of employees of AGC's unionized members. *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 87 S.Ct. 565 (1967); *Detroit Edison Co. v. N.L.R.B.*, 440 U.S. 301, 99 S.Ct. 1123 (1979).

But AGC has no obligation to act as an involuntary, *ad hoc* source of reference to fuel the Unions' endeavors to organize open shop contractors.

If the Opinion of the Court of Appeals is permitted to stand, every trade association containing both open shop and unionized members may find itself acting as an involuntary tool for the Unions' organizational efforts.

The ultimate result will be to force open shop contractors out of the membership ranks of industry-wide associations such as AGC, depriving these members of the non-collective bargaining services such associations perform. It will also deprive the associations of much-needed revenue, forcing them to raise the dues of their unionized members, thereby increasing costs in the unionized sector of the construction industry.

B. The Court of Appeals Failed to Properly Weigh the Interests of the Open Shop Employers Against the Interests of the Unions, in Violation of the Requirements Set Forth in Detroit Edison Co. v. NLRB.

In *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 99 S.Ct. 1123 (1979), this Court reversed and remanded a Sixth

Circuit Court of Appeals decision, which had enforced an order of the National Labor Relations Board requiring an employer to supply a union with certain information pertaining to an employee aptitude testing program. The Court held that the Board's order failed to adequately take account of the interests of individual employees in the confidentiality of their test scores, and the interest of the company in the confidentiality of the test battery.

Similarly, in the present action, the Court of Appeals has uncritically accepted the Unions' vague explanation of why it wishes a list of all open shop members of AGC, while failing to weigh the reasons advanced by AGC for keeping such information confidential.

The Court of Appeals noted, with apparent approval, five "reasons" cited by the Unions for requiring AGC to furnish a roster of its open shop members. These are as follows:

(1) To "monitor name changes pursuant to the contract provisions." 633 F.2d at 769. The record in this case is barren of any indication that any AGC member ever changed its name as a way of avoiding obligations under collective bargaining agreements. Neither the Court of Appeals nor the Board noted any instance of such a name change by an AGC member.

(2) To "identify employer transfer from one membership classification to another." 633 F.2d at 769. Again, there is nothing in the record, and the Court of Appeals and the Board cite no evidence, that any AGC member has ever transferred from one membership classification to another.

(3) To "enforce their [the Unions'] position that all AGC members were bound to the Laborers contract." 633 F.2d at 769. As the Court of Appeals noted, open shop members do not delegate any collective bargaining authority to AGC. 633 F.2d at 769. How, then, can the Unions (and the Court

of Appeals) seriously maintain that open shop members of AGC can be bound to collective bargaining agreements AGC negotiates with the Unions?

(4) To "facilitate bargaining by identifying who AGC represented." 633 F.2d at 769. It is impossible to accord credence to this "reason," since uncontradicted testimony established that AGC tendered a list of those contractors it was authorized to represent at the commencement of each collective bargaining session with each Union.

(5) To "police and enforce the contracts." 633 F.2d at 769. Again, there is nothing in the record to explain how a list of AGC members *not* bound by the contracts will assist the Unions in enforcing contracts against AGC members who *are* bound.

In contrast to the vague reasons advanced by the Unions for requesting AGC's roster of open shop members, AGC and its open shop members have concrete and substantial reasons for protecting the confidentiality of the roster.

Disclosure of the roster will surely subject open shop members to intensive union organizational activity. Moreover, the basic craft unions have already launched four lawsuits against open shop members of AGC, in each case asserting that the open shop members are bound to AGC's Master Labor Agreements with the Unions. In each of these cases, the Unions have been denied relief by the District Courts.[9] Nevertheless, the time and expense involved in preparing responses to such meritless lawsuits has an undeniable dampening effect upon the interest of open shop contractors in joining AGC.

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[9]These decisions are not officially reported. Two of the cases are unofficially reported: *Iron Workers v. Flory Constr. Co.*, 106 LRRM 2380 (N.D. Cal. 1980); *Laborers v. Petersen Pacific*, 104 LRRM 2479 (N.D. Cal. 1980).

In the *Detroit Edison* decision, this Court made it clear that the Circuit Courts of Appeal were not to act as a "passive conduit" for the enforcement of the Board's orders. This Court there held that "the duty to supply information under Section 8(a)(5) 'turns upon the circumstances of the particular case' *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 153, 76 S.Ct. 753, 756, 100 L.Ed.2d 1027, and much the same can be said for the type of disclosure that will satisfy that duty."

In *Detroit Edison*, this Court held that the "arguable relevance" of information requested by the union is not the only consideration to be taken into account: "The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here." *Detroit Edison Co. v. N.L.R.B.*, *supra*, 99 S.Ct. at 1133.

Flying in the face of this holding, the Board held the Unions' request for information, if relevant, must be honored even if the information might be used for improper purposes.

In the present action, had the Unions had any serious interest in unearthing specific contract violations, they could have requested information about those contractors they felt were possible contract violators. But no such contractors were identified. Similarly, the Board and the Court of Appeals could have accommodated the Unions' interest in exposing contract violators by fashioning an order which would require the disclosure of information about such suspect entities. Instead, the Board's Order, enforced by the Court of Appeals, requires the disclosure of the names and addresses of *all* open shop contractors, regardless of whether the Unions have any grounds to believe they are operating

improperly. If this Order is upheld, any non-union contractor who joins AGC will, simply as a result of becoming a member of AGC, be subjected to union scrutiny.

C. The Court of Appeals Has Ignored the Historic Distinction Drawn Between Information Concerning Bargaining Unit and Non-Bargaining Unit Members.

In determining the scope of information which is relevant to the Unions' function as collective bargaining representatives of their members, the Courts of Appeal have drawn a sharp distinction between requests for information directly pertaining to those within the bargaining unit and requests for information about those outside the unit. The rule appears to be that "certain types of information, such as wage data pertaining to employees *in the unit*, are so intrinsic to the core of the employer-employee relationship that such information is considered presumptively relevant." *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 868 (9th Cir. 1977). Conversely, "where the request is for information concerning employees outside of the bargaining unit, the union must show that the information requested is relevant to bargainable issues." *San Diego Newspaper Guild v. NLRB, supra.*

Where the information requested relates to non-unit parties, a demonstration of "abstract, potential relevance" of the information requested is not sufficient. "When the union asks for information which is not presumptively relevant, the showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful to the union in determining if the employer has committed some unknown contract violation." *San Diego Newspaper Guild v. NLRB, supra,* 548 F.2d at 868. The Union must make some "initial, but not

overwhelming, demonstration" that a contract violation "is or has been taking place." *San Diego Newspaper Guild v. NLRB, supra.*

The distinction between information regarding unit and non-unit personnel has been recognized by several circuits. See, *e.g., International Telephone & Telegraph Corporation v. NLRB,* 382 F.2d 366, 372 (3d Cir. 1967); *NLRB v. Western Electric, Inc.,* 559 F.2d 1131 (8th Cir. 1977); *NLRB v. Rockwell-Standard Corporation,* 410 F.2d 953, 957 (6th Cir. 1969).

As we have previously noted, the Unions presented no evidence to show that *actual* contract violations were taking place in the proceedings below, nor were they able to pinpoint specific instances of *possible* contract violations. Fairly viewed, the most that was demonstrated by the evidence offered by the Unions was that some unidentified member or members of AGC *might* be committing a contract violation in some unexplained manner. This is the type of generalized "suspicion or surmise" which was condemned in the Ninth Circuit's own *San Diego Newspaper Guild* decision. No Court of Appeals opinion, prior to this one, appears to have supported the requirement that information be disclosed about non-bargaining unit entities on a showing as flimsy as that proffered in the present case.

Moreover, neither the Court of Appeals, the Board, nor the Unions were ever able to explain how a bare list of the names and addresses of open shop members of AGC would enable the Unions to discover any specific collective bargaining agreement violations. The Order requiring the disclosure of this list will equip the Unions with a list of non-bargaining unit contractors who may have no greater relationship with their unionized contractor brethren than the mere fact that they belong to the same trade association.

In *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 87 S.Ct. 565 (1967), this Court held that a "discovery type standard" could appropriately be employed to determine what information was relevant to the Unions' role as collective bargaining agent. However, the Court appeared to indicate that a mere *possibility* of relevance was not sufficient; there must be a "*probability* that the desired information was relevant, *and* that it would be of use to the Union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co., supra,* 385 U.S. at 437. (Emphasis supplied.) No such showing has been made in this case. In contravention of this Court's holding in *Acme Industrial Co.* the record below cannot be honestly characterized as demonstrating that there is a probability that the disclosure of a roster of AGC open shop members will be of use to the Unions in representing employees of AGC's unionized members.

D. The Court of Appeals and the Board Failed to Accord Sufficient Weight to the Credibility Determinations Made by the Administrative Law Judge.

There are numerous cases in which the Courts of Appeal have reflected upon the difficult situation which arises when the Board rejects findings of a trial examiner, based upon his impression of the credibility of the witnesses. See, *e.g.*, *Penasquitos Village, Inc. v. N.L.R.B.*, 565 F.2d 1074, 1078 (9th Cir. 1977); *Ward v. N.L.R.B.*, 462 F.2d 8, 12 (5th Cir. 1972); *N.L.R.B. v. Howell Automatic Machine Co.*, 545 F.2d 1077, 1079 (6th Cir. 1972); *Eastern Engineering v. N.L.R.B.*, ... F.2d ...., 106 LRRM 2097 (3d Cir. 1981).

Following the direction of this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496, 71 S.Ct. 456 (1951), these cases generally accord the implicit or explicit credibility determinations made by an Administrative Law Judge

significant weight with regard to factual issues in dispute in the case.

The entire focus of this case is on the motives of the Unions in seeking the roster of AGC's open shop members. Although the Administrative Law Judge did not make explicit findings regarding the credibility of each separate witness who testified, it is quite clear that he believed the Unions were seeking AGC's open shop roster to further their goal of organizing open shop contractors, rather than to represent unionized employees of contractors within the collective bargaining unit. In his Opinion, the Administrative Law Judge stated: "While disclosure of the open shop roster could well assist these charging parties, plus their higher affiliates, in research and strategy planning [to organize open shop contractors] it cannot be said they have that entitlement under [the] doctrine of whether certain information is relevant and necessary to fulfillment of a representational role. To grant this would smack of participating in the notorious 'top down' mode of organizing employees. . . . In the last analysis, the case becomes one of whether non-union construction firms may purchase the administrative and promotional services of an industry support mechanism, without further entanglements stemming from a separately existing labor relations function. I believe a negative answer would overreach to the detriment of basic Section 7 rights as preserved to employees." (Appendix "D," *infra*.)

The Board rejected the Administrative Law Judge's conclusions on the ground that they were "largely the product of speculation and conjecture, for the record of the hearing herein reflects no substantial evidence in support thereof." The magnitude of this misstatement can only be appreciated when one considers that Messrs. Van Bourg and Null all

but admitted in their testimony that their purpose was to stamp out open shop construction contracting in California.

The Board and the Court of Appeals sought to justify the Board's refusal to adhere to the credibility findings of the Administrative Law Judge by asserting that the Board's Opinion rested on "derivative inferences" drawn from its "broad experience and expertise." 633 F.2d at 772. We submit that this mischaracterizes the Board's treatment of the record. The Board has simply elected, contrary to the Administrative Law Judge, to believe all of the flimsy "reasons" that Messrs. Van Bourg and Null advanced for needing the names of open shop members of AGC. There is nothing in the Decision and Order of the Board, or the Opinion of the Court of Appeals, to explain why they chose to accord credence to the Unions' asserted motives, when the Administrative Law Judge obviously found the testimony regarding these motives wanting in credibility.

E. Conclusion.

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

COX, CASTLE & NICHOLSON,
JAMES P. WATSON,
Attorneys for Petitioner,
Associated General Contractors
of California, Inc.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Petitioner,	)	No. 79-7484
vs.	)	
ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC.,	)	OPINION
Respondent,	)	
and	)	
46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,	)	
and	)	
NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,	)	
Intervenors.	)	

On Application for Enforcement of an Order of the National Labor Relations Board
Argued and Submitted September 9, 1980

Before: WRIGHT and POOLE, Circuit Judges, and BROWN, Senior District Judge*

WRIGHT, Circuit Judge:

The National Labor Relations Board ordered a multi-employer bargaining agent to furnish a complete roster of its members to two unions.[1] The issue is whether a refusal to disclose the roster was a failure to bargain in good faith. We modify the Board's order, and enforce it as modified.

I

Associated General Contractors of California (AGC) is a trade associa-

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*Of the District of Kansas.

[1] 242 NLRB No. 124 (June 8, 1979).

tion performing various services for its member contractors. Prior to 1971, it had five membership classifications: Regular, Specialty, Joint Venture, Affiliate, and Honorary. Pursuant to AGC's Bylaws, only the Regular, Specialty, and Joint Venture members conferred authority on AGC to engage in collective bargaining and enter into collective-bargaining agreements on their behalf.

In 1971 AGC added an Open Shop classification. Under AGC's amended Bylaws, a contractor may not be admitted as an Open Shop member if it is subject to any existing collective bargaining agreement. Open Shop members give no collective bargaining authority to AGC.

In 1976 AGC added an Open Shop

Specialty classification, under terms similar to those applicable to the Open Shop classification.

The Carpenters' Union[2] and the Laborers' Union[3] have engaged in collective bargaining with AGC since 1942. Each union entered into a three-year Master Agreement with AGC in 1974.

The Carpenters' contract bound every Regular, Specialty, and Joint Venture member of AGC. The Laborers' contract was unclear as to which employers it purported to cover. The unions

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[2]46 California Counties Carpenters Conference Board, United Brotherhood of Carpenters & Joiners of North America, AFL-CIO.

[3]Northern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO.

contend it bound all AGC members. AGC argues only Regular, Specialty and Joint Venture members were covered. The Board did not decide the issue. We assume, without deciding, that Open Shop and Open Shop Specialty members were not bound solely by virtue of their AGC membership.[4]

Both contracts contained provisions binding employers regardless of changes in the name, style, or address of their businesses.

Following negotiation of the 1974 contracts, AGC sponsored seminars on the operation of open shops, including methods of converting from union to

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[4] If such members were bound under the terms of the agreements, a roster of their names and addresses clearly would be relevant to the unions' duties. See Part IIA, infra.

open shops, and of operating both union and open shops (double-breasted construction).

The union became concerned about the growing number of open shop contractors. AGC's open shop membership increased from 10 in 1974 to 60 in 1978. Employer contributions to union trust funds decreased, despite industry-wide increases in construction volume and employment.

The unions believed AGC members subject to the collective-bargaining agreements (approximately 550) would transfer classifications or establish a second, open shop operation. They set up an elaborate system to check the identities of newly licensed firms. They have identified one California contractor (not an AGC member, however) which changed its

name 18 times in nine months.

They have pointed to three instances in which an AGC member bound by the Master Agreement shared common ownership with an open-shop contractor. In at least one of those cases, however, the Regional Director of the Board has determined the open shop contractor was not the "alter ego" of the union shop contractor and, thus, not subject to the Master Agreement.

As the end of the 1974 contracts neared, the Carpenters requested a roster of AGC's entire membership. Subsequently, both unions made this request, asserting they needed the full roster in order to: (1) monitor name changes pursuant to the contract provisions; (2) identify employer transfer from one membership classifi-

cation to another; (3) enforce their position that all AGC members were bound by the Laborers' contract; (4) facilitate bargaining by identifying who AGC represented; and (5) police and enforce the contracts.

AGC regularly provides the unions with rosters of its Regular, Specialty, and Joint Venture members, and updates those rosters from time to time. It refused, however, to provide a full membership roster.

The unions filed charges with the Board in January of 1977, alleging AGC had failed to bargain in good faith. They also entered into new three-year Master Agreements with AGC, containing the same provisions as the 1974 agreements on name and style changes and on employer coverage.

After a hearing, an Administrative Law Judge dismissed the charges. He found the "basic failing" in the unions' position to be the absence of language in the collective-bargaining agreements identifying the employers that are covered. He apparently felt the reason the unions wanted the roster was to engage in "the notorious top down mode of organizing" open shop employees. He did not, however, make explicit findings of fact or conclusions of law.

The Board found the full roster relevant to the unions' performance of their statutory duties. The full roster was necessary to enable the unions to investigate the possibility of unlawful breasted construction, to assess the advisability of initiating grievances or taking other remedial action, and to

formulate contract proposals regarding employers to be covered by the Master Agreements.

II

The legal principles which govern this case are well settled. The duty to bargain in good faith, imposed by §8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. §158(a)(5) (1976), may be violated by an employer's refusal to furnish information relevant to the union's negotiation or administration of a collective-bargaining agreement. Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979); NLRB v. Acme Industrial Co., 385 U.S. 432, 435-36 (1967); NLRB v. Truitt Manufacturing Co., 351 U.S. 149, 152 (1956).

Information relevant to the

filing or processing of grievances is relevant to contract administration. Acme Industrial Co., 385 U.S. at 436-38, NLRB v. Goodyear Aerospace Corp., 388 F.2d 673 (6th Cir. 1968).

Whether there has been a violation turns upon the facts of the case. Truitt, 352 U.S. at 153-54; Shell Oil Co. v. NLRB, 457 F.2d 615, 618 (9th Cir. 1972). See Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958).

Although only relevant information must be disclosed, a refusal to disclose even relevant information is not always a §8(a)(5) violation. Emeryville Research Center v. NLRB, 441 F.2d 880, 885 (9th Cir. 1971) (problem is one of accommodating competing interests); Shell Oil, 457 F.2d at 618. See Gorman,

Basic Text on Labor Law, 417-18 (1977). The employer's reasons for nondisclosure and the negotiating conduct of the parties must be considered. See Shell Oil, 457 F.2d at 618.

A.

The threshold question is whether the information sought is relevant to the unions' duties. The Board and the courts have employed a liberal, discovery-type standard of what constitutes relevant information. Acme Industrial Co., 385 U.S. at 437; San Diego Newspaper Guild v. NLRB, 548 F.2d 863, 867 (9th Cir. 1977).

The Board's determination on this issue is given great weight, either because it is a finding of fact, which is conclusive if supported by substantial evidence, or because it is a finding on a

mixed question of law and fact which is within the expertise of the Board. San Diego Newspaper Guild, 548 F.2d at 867.

The information sought by the unions does not fall within the category of information that is presumptively relevant[4a] and thus, the unions had the initial burden to show relevancy. San Diego Newspaper Guild, 548 F.2d at 867-68. They introduced evidence establishing an increase in the number of open shop contractors, AGC sponsorship of seminars instructing contractors on conversion from union to open shops, and

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[4a] Information directly relating to unit employees (e.g., wages, related financial benefits) is deemed presumptively relevant, and the employer has the initial burden to rebut that presumption. See San Diego Newspaper Guild, 548 F.2d at 867-68.

common ownership of some union and open shop contractors.

Two or more employers, if they are "alter egos," may be treated as a single employer under the NLRA. If one is subject to a collective-bargaining agreement, the others will be bound by it. See NLRB v. Don Burgess Construction Corp., 596 F.2d 378, 384-86 (9th Cir.), cert. denied, 444 U.S. 940 (1979). AGC emphasizes that common ownership alone will not bind the open shop employers. See id. at 384 (common ownership one of four factors considered).[5] Under the facts of this

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[5]The open shop employers may be bound by operation of the change of name and style provisions in the Master Agreements. Although we need not decide

(Footnote continued)

case, however, the unions have met their initial burden by showing that the information sought is relevant to investigations of contract violations, and that there is a reasonable basis for further investigation.[6]

(Footnote 5 continued)

not be the same as that applied under the Act to determine whether an open shop contractor is bound.

[6]A reasonable basis for further investigation is sufficient under a discovery standard. Cf. Fed. R. Civ. P. 26(b) (1) (discoverable information need only appear "reasonably calculated to lead to the discovery of admissible evidence"). A major purpose of the labor laws is to promote peaceful resolution of labor disputes, and it furthers that purpose to permit unions to have access to information needed to investigate alleged violations prior to initiating full-scale grievance proceedings. Acme Industrial Co., 385 U.S. at 437-39; P.R. Mallory & Co. v. NLRB, 411 F.2d 948, 954-56 (7th Cir. 1969).

(Footnote continued)

(Footnote 6 continued)

AGC relies on our decision in San Diego Newspaper Guild v. NLRB, 548 F.2d 863 (9th Cir. 1977), in which case the Board determined the employer had not failed to bargain in good faith when it refused to provide information concerning its training of persons to perform bargaining unit tasks in the event of a strike. We held:

> the showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful to the union in determining if the employer has committed some unknown contract violation. Id. at 868.

We noted, however, that to require an initial, burdensome showing would frustrate the purposes of the liberal discovery standard. Id. at 868-69. We emphasized that great weight should be given the Board's determination. Id. at 869.

We reach a different result here, as did the Board, because the cases are factually distinguishable. In upholding the Board's decision, the San

(Footnote continued)

AGC makes three arguments to rebut this showing: first, no actual violations have been established; second, the roster will not aid the unions in uncovering contract violations; and third, the unions really want the roster in order to engage in organizational activities.

(Footnote 6 continued)

Diego court referred to five factors. Id. The union had introduced no evidence to support its claim that contract violations might be taking place, and failed to contradict the employer's testimony to the contrary. It failed to show it had taken steps to investigate possible violations. Its suspicion had "been shown by the record before the Board to be totally unfounded." Id.

Here, the unions have shown an objective basis for their suspicions. They have provided concrete examples, and they have taken other steps to investigate possible violations. Clearly, the record before the Board did not show their suspicions to be "totally unfounded."

The first argument misconstrues the standard to be applied. It is sufficient that the information sought is relevant to possible violations where the union has established a reasonable basis to suspect such violations have occurred. Actual violations need not be established in order to show relevancy. See Acme Industrial Co., 385 U.S. at 437-39; P.R. Mallory & Co. v. NLRB, 411 F.2d 948, 954 (7th Cir. 1969).

The second argument concerns the usefulness of the rosters. If employers subject to the agreements are operating open shops under different names and addresses, AGC argues, the rosters will be of no assistance in identifying them. Moreover, several factors must be considered to determine whether an open shop contractor is the

"alter ego" of a union shop and thus bound by the agreement. AGC argues the roster will not aid materially in evaluating those factors.

Again, however, AGC seeks to impose an excessively stringent standard. It is not essential that the information fully resolve the question whether a contract violation has occurred. The roster would enable the unions to investigate specific Open Shop members rather than having to examine all 550 Regular, Specialty, or Joint Venture members, or all newly licensed contractors. It is sufficient under a liberal discovery standard that the roster would aid in the unions' investigation of contract violations.

Third, the potential use of the roster for organizational purposes does

not make it irrelevant to the unions' duties in administering the contract. AGC cites NLRB v. A.S. Abell Co., 104 L.R.R.M. 2761 (4th Cir. 1980), which held an employer's showing of prior misuse of requested information rebuts a presumption of relevance. The court also held, however, that the information could be obtained if the union, as here, made an affirmative showing of relevance.[7]

Moreover, there has been no showing of prior misuse here. Although we give some consideration to the ALJ's "finding" that the unions were interested in "top down" organizing,

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[7]The union presented nothing more than a "bare assertion" that it needed the information. 104 L.R.R.M. at 2765.

substantial evidence on the record as a whole supports the Board's findings of relevance.[8]

B.

As noted, failure to disclose relevant information is not necessarily a failure to bargain in good faith. Several factors have been urged by AGC and Amicus, the National Association of General Contractors, as justifying AGC's refusal to supply the roster. Specifically, they claim disclosure would violate their members' First Amendment

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[8]The ALJ never addressed the question whether the roster was relevant to uncovering unlawful double-breasted operations. We agree with the Board that its conclusion on that issue is based not on a credibility determination, but on derivative inferences drawn from its broad experience and expertise. See Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1078-80 (9th Cir. 1977).

rights, and subject them to violence and harassment. AGC argues the importance of disclosure is lessened since it already reviews Open Shop applicants to insure they are not subject to existing collective bargaining agreements.

Nothing in the record supports AGC's concern that the unions will engage in violent, harassing, or unlawful conduct. The First Amendment cases cited by Amicus, N.A.A.C.P. v. Button, 371 U.S. 415 (1963) and Bates v. Little Rock, 361 U.S. 516 (1960), are therefore inapplicable.[9] There is no "clear and

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[9]The Board's order does not run afoul of the First Amendment. Any attempt to reconcile an asserted governmental interest in disclosure with First Amendment rights must be made in the context of the labor relations

(Footnote continued)

present" danger justifying a refusal to supply the roster. See Shell Oil Co. v. NLRB, 457 F.2d 615, 618-19 (9th Cir. 1972).

AGC's independent review of Open Shop applicants also does not justify nondisclosure. That review is not responsive to the unions' needs: information from which to make its own

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(Footnote 9 continued)

setting. NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969). Association that would otherwise be protected may be regulated if necessary to protect substantial rights of employees or to preserve harmonious labor relations in the public interest. Id. Those interests outweigh any minimal interference with associational rights which might be present here. We note that AGC publishes the names of its members in trade journals and public media, albeit not its membership classifications. The record does not support its claims that disclosure of the roster will have an adverse impact on its membership.

determination regarding possible contract violations. See Curtiss-Wright Corp. v. NLRB, 347 F.2d 61, 70 (3d Cir. 1965).

Disclosure of the rosters of Open Shop and Open Shop Specialty members does not impose an onerous burden on AGC. See Prudential Insurance Co. v. NLRB, 412 F.2d 77, 85 (2d Cir.), cert. denied, 396 U.S. 928 (1969). No persuasive reason for nondisclosure is established in the record, nor has AGC proposed any practicable alternative to disclosure. Its refusal to provide the roster was therefore a failure to bargain in good faith in violation of §8(a)(5).[10]

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[10] Amicus argues that the unions have waived their right to obtain the roster. That argument is clearly without merit. See Gorman, Basic Text on Labor Law, 418 (1977).

III

The Board ordered AGC to furnish the unions with a full membership roster. The record establishes the relevancy, however, of a roster of Open Shop and Open Shop Specialty members only. We modify the Board's order to include only those membership classifications.

The Board's order is enforced as modified. It may present a judgment in accordance with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., Respondent, and 46 NORTHERN CALIFORNIA COUNTIES CONFERENCE BOARD, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF NORTH AMERICA, AFL-CIO, and NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Intervenors.	)	NO. 79-7484 ORDER

Before: WRIGHT AND POOLE, Circuit Judges, and BROWN, Senior District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Poole have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

PMT

D-5125
San Francisco, CA

242 NLRB No. 124

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

and

46 CALIFORNIA COUNTIES CARPENTERS CONFERENCE BOARD, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF NORTH AMERICA, AFL-CIO

and

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

DECISION AND ORDER

On April 7, 1978, Administrative Law Judge David G. Heilbrun issued the

attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Parties[1] filed exceptions and supporting briefs, and Respondent[2] filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light

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[1]Also referred to herein as the Unions, collectively, and as the Carpenters and the Laborers, individually.

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[2]Also referred to herein as AGCC.

of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The complaint alleges that Respondent - acting in its capacity as a multiemployer bargaining representative - violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Charging Parties with requested information as to the names of all AGCC employer-members, including the "open-shop" employer-members who Respondent asserts are not bound by the parties' collective-bargaining agreements.

The Administrative Law Judge recommended that the complaint be dismissed in its entirety. In so doing, his conclusions appear totally based on

attribution to the Unions of ulterior motivations for requesting the contested information. And such attribution is, in turn, largely the product of speculation and conjecture for the record of the hearing herein reflects no substantial evidence in support thereof. Moreover, the Administrative Law Judge erred in failing to examine the principal issue raised in the complaint - whether the requested information had probable and potential relevance to the Unions' statutory obligation to represent employees within the contractual bargaining units - by application of well-established principles and criteria which were approved by the courts in such cases as N.L.R.B. v. Acme Industrial Co., 385 U.S. 432 (1967), and Curtiss-Wright Corporation, Wright Aeronautical Division

v. N.L.R.B., 347 F.2d 61 (3d Cir. 1965). For the reasons set forth below, we find merit in the exceptions of the General Counsel and the Charging Parties and conclude that Respondent's refusal to furnish the requested information was violative of the Act.

Respondent is a trade association which represents firms in the building construction industry for purposes, inter alia, of labor relations. It has had lengthy collective-bargaining relationships with the Charging Parties and, at the time the events herein arose, was party to a 3-year collective-bargaining contract with each of them - both contracts expiring on June 15, 1977.[3]

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[3]These contracts are referred to hereinafter as the 1974-77 contracts.
[Footnote continued on page 6]

Respondent has numerous classifications of membership which, for purposes relevant to this decision, may be summarized as regular, specialty, joint-venture, open-shop, and open-shop specialty. As found by the Administrative Law Judge, the AGCC-Carpenters contract binds to its provisions all of Respondent's regular, specialty, and joint-venture members. As to the AGCC-Laborers contract, it is undisputed that it binds, at

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[Footnote 3 continued]

Subsequently, AGCC entered into further 3-year contracts with each of the Unions which are hereinafter collectively referred to as the 1977-80 contracts. Hereinafter, when references are made to contractual provisions but no contract date is specified, it is because the provisions discussed are identical in both the 1974-77 and 1977-80 agreements.

minimum, all employer-members in the same classifications.[4] Further, with regard to the extent to which the operations of AGCC employer-members are covered by the respective contracts, the Carpenters agreement provides, in pertinent part, as follows:

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[4]The Charging Parties assert that the Laborers agreement binds "all" AGCC members (including those in the "open-shop" membership categories) and except to the Administrative Law Judge's conclusions to the contrary. As the Administrative Law Judge, in analyzing this issue, failed to give any consideration to, or even mention, the contract's sec. 16(a) - which, on its face, states that it "shall be binding upon all persons, firms, or corporations that . . . are, or during the term hereof become, members of the Employer" - we give no weight to his conclusions. However, we need not and shall not pass upon this issue as it was not fully litigated at the hearing and neither the General Counsel nor the Charging Parties assert contract coverage of "all" AGCC members as a basis for establishing the relevance of the requested information which is the subject of this litigation.

Section 9 - Liability of the Parties

> This Agreement is binding upon each individual employer regardless of whether or not he or it changes the name or style or address of his or its business.
>
> Each individual employer, corporate or other entity, or its successor, shall be liable under, subject to and bound by the Agreement . . . .

Similarly, the AGCC-Laborers contract provides, in pertinent part, as follows:

Section 30 - Change of Name or Style

> This Agreement is binding upon each individual employer regardless of whether or not he or it changes the name or style or address of his or its business. Each individual employer shall give notice

> in writing to said District Council of any intent to change the name, style or address of his or its business, or to perform business under more than one name or style or at more than one address, prior to the adoption of a new or different name, style, or address, or the addition of new names or styles or addresses, as specified herein.
>
> Nothing in this paragraph shall be construed as adding to the scope of work covered by this Agreement.

Prior to 1972, all AGCC members were concededly bound to Respondent's contracts with the Carpenters and Laborers, to the extent that such individual members had employees in the job classifications covered by those agreements. In 1972, for the first

time, AGCC established an "open-shop" membership classification for general contractor members who did not authorize it to act as their collective-bargaining representative and who employed no personnel covered by a collective-bargaining agreement. Subsequently, Respondent established an "open-shop specialty" classification for contractors other than general contractors who met the same conditions.

Before the establishment of the "open-shop" membership classification, it had been Respondent's custom to supply the Unions with the complete AGCC membership roster, as periodically supplemented by notifications as to new members and resignations. Starting in 1974, Respondent substituted for its full membership list a document entitled

"Membership Roster for Collective Bargaining Purposes," which set forth only regular, specialty, and joint-venture members and excluded, inter alia, the open-shop and open-shop specialty members.

Following the execution of the 1974-77 agreements, Respondent nurtured the expansion of open-shop activity by its members and prospective members by sponsoring seminars and programs for members and the public where advice was given pertaining to the technical details of open-shop and "double-breasted" operations,[5] the difficulties members

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[5]The term "double-breasted" is used to describe contractors who operate two companies, one unionized and the other nonunionized or open-shop. Depending on the underlying facts and

[Footnote continued on page 12]

would have in changing their styles of operation, and the guidelines which should be followed to assure that - in the case of double-breasted construction - the degree of separation maintained between the two operations (union and open-shop) is sufficient to avoid application of the collective-bargaining

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[Footnote 5 continued]

circumstances of each case, the employees of both constituent companies may be held to constitute a single appropriate bargaining unit or the employees of each may be held to form separate units. In the former case, the collective-bargaining agreement covering the employees of the unionized firm may be held to cover the employees of the nonunion firm as well; or the employer may be ordered to bargain on behalf of both firms with the union which had represented the unionized portion of such a double-breasted operation. See, for example, Don Burgess Construction Corporation, 277 NLRB 765 (1977); R. L. Sweet Lumber Company, 207 NLRB 529 (1973), enfd. 515 F.2d 785 (10th Cir. 1975), cert. denied 423 U.S. 986.

agreement to the nonunion enterprise. Also, AGCC established an open-shop committee and sought to set up nonunion employee referral, fringe benefit, and apprenticeship programs. The Unions became aware of these AGCC activities as well as of publications of the national Associated General Contractors of America which, inter alia, gave instructions on double-breasted and open-shop operations and suggested the phasing out of union operations and withdrawal from multiemployer bargaining units. The number of AGCC open-shop members, in seeming response to such stimulus, increased over the years - from 10 in 1974 to approximately 60 at the time of the hearing in this case.

On December 27, 1976, the Carpenters sent Respondent a letter stating, in pertinent part:

> . . . this is a formal request that you submit to us a roster showing the names of all members of the AGC, including those whom you contend are not bound by the Master Agreement negotiations.
>
> All we are seeking is a roster of contractor members. It is very important with respect to our contractual positions with the AGC. We feel you have an obligation under Section 8(a)(5) of the Labor Management Relations Act of 1947, as amended, to supply that information in connection with current ongoing negotiations.

Then, on February 3, 1977, the Laborers and Carpenters sent Respondent substantially identical letters which - after

acknowledging receipt of notifications from AGCC containing the names of new members and member resignations - went on to state:

> Please advise if any of these members have joined your Open Shop Division and give us a copy of the Open Shop Division Roster so that we can compare for ourselves. We want to know if there has been a change of names of any of these contractors and in what capacity they may have joined another branch of your organization.

Later in 1977, at the beginning of contract negotiation sessions, representatives of the Laborers and Carpenters again requested AGCC to supply complete membership rosters, stating that such information was also needed to police better the collective-bargaining

agreements and to enforce contractual provisions governing the collection of fringe benefit contributions from employers. As found by the Administrative Law Judge, Respondent refused, and continues to refuse, to furnish the Unions the requested information.

At the hearing, and in various communications between the parties prior thereto, the Unions expressed their need for the requested information on a broader basis. One of their principal reasons appears to be fear that Respondent's actions have fostered growth in the relative number of open-shop employers and volume of nonunion construction;[6] and that, as a result

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[6]At the hearing, the General Counsel introduced into evidence the

[Footnote continued on page 17]

thereof, some AGCC employer-members who are bound to AGCC's collective-bargaining agreements with the Unions have, in whole or in part, attempted to escape their contractual obligations by changing their names, styles, and corporate status and/or by creating double-breasted or

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[Footnote 6 continued]

5-year historical record kept by the Carpenters pension fund which lists the monthly totals for carpenters employed and reported hours worked (for fringe benefit contribution purposes) in construction covered by the AGCC-Carpenters contract. It shows a generally declining trend in the number of carpenters employed and a similar decline in hours worked which resulted in a diminution of pension fund contributions by the covered employers.

alter ego operations.[7] The record herein establishes that, in fact, some AGCC members in "open-shop" membership categories do share elements of common ownership and common officers with other AGCC members who are concededly bound by AGCC's contracts with the Unions, and

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[7]The Unions contend that, under the provisions of sec. 9 of the AGCC-Carpenters contract and sec. 30 of the AGCC-Laborers contract, supra, the nonunion segments of double-breasted operations are covered by their respective collective-bargaining agreements, and that such was their intent in negotiating those provisions. In addition to fears that their bargaining units are being eroded by the operations of double-breasted employers, the Unions also expressed concern that employers bound to their contracts were closing out unionized firms while opening new, nonunion, companies which would proceed to join AGCC in open-shop membership categories. The Unions contend that secs. 9 and 30, respectively, of their agreements serve to bind such new, allegedly nonunion, firms as well.

that AGCC has not reported these facts to the Unions.

It is well established that, under Section 8(a)(5) of the Act, an employer is obligated to provide a union with requested information if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees' exclusive bargaining representative. N.L.R.B. v. Acme Industrial Co., supra. And the fact that the requested information may relate to employers and employees outside the represented bargaining unit does not, by itself, negate its relevance.[8] Moreover,

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[8] Curtis-Wright Corporation v. N.L.R.B., supra; Hollywood Brands, Inc.,

[Footnote continued on page 20]

here one of the Union's principal purposes in securing such information was to facilitate inquiry into that very question -- i.e., whether some of AGCC's open-shop members are, in fact, bound by the Unions' contracts and included in the represented bargaining units.

Respondent's executive director testified that AGCC conformed with the provisions of section 9 of the Carpenters contract and section 30 of the Laborers contract, supra, by regularly informing the Unions as to any name, address, or business style changes effectuated by

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[Footnote 8 continued]

142 NLRB 304 (1963), enfd. 324 F.2d 956 (5th Cir.), cert. denied 377 U.S. 923 (1964). Cf. Rodney and Judith Adams, d/b/a Adams Insulation Company, 219 NLRB 211 (1975).

AGCC employer-members who were bound to the respective labor agreements. But he conceded that no such reports were ever made with respect to AGCC open-shop members who shared elements of common ownership and/or common officers with firms in membership categories which were admittedly bound to the Unions' contracts. Clearly, Respondent effectively determined, entirely by itself, that those open-shop members were not the same employing entities as the unionized firms with which they appear to have some relationship.[9]

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[9]Respondent's executive director testified that the great majority of its open-shop and open-shop specialty members have no relationship whatever with construction firms which are bound to collective-bargaining agreements. And, as to the minority of

[Footnote continued on page 22]

To exercise their statutory responsibilities - with respect to both

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[Footnote 9 continued]

open-shop members who do have some such connection, AGCC determined - without consultation, or the sharing of information, with the Unions - that the degree of separation maintained between two wings of such double-breasted operations was sufficient to free the "open-shop" firms from any contractual obligations under the collective-bargaining agreements binding the related unionized firms.

With respect to Respondent's initial determination of whether there is any relationship whatever between particular open-shop members and members bound to labor contracts, the record fails to establish that AGCC's investigations are thorough and complete. For, Respondent's executive director conceded that he only learned from union evidence at the hearing that a specific pair of its employer-members bore a "double-breasted" relationship toward one another. And, moreover, Respondent

[Footnote continued on page 23]

contract administration and contract negotiations - the Unions are entitled to have equal access to the same data so that they may intelligently evaluate the facts and, thereby, reach their own conclusions on whether or not to pursue remedies for possible contract violations

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[Footnote 9 continued]

offered no explanation for the fact that the "collective-bargaining" membership rosters it supplied to the Carpenters and Laborers contained differences between them with respect to the listings of regular and joint-venture employer-members who were represented by AGCC for collective-bargaining purposes.

The above-noted factors, in our view, lend supporting weight to the Unions' contention that - to define sharply the dimensions of the represented bargaining units - they must know the names of both the AGCC members concededly bound to their contracts and the AGCC members who Respondent contends are not so bound.

or to seek provisions in the contracts under negotiation which will serve to preserve the integrity of their respective bargaining units and the financial stability of the contractual fringe benefit funds which have been adversely affected by the downward trend in work-based employer contributions. Therefore, Respondent's duty to bargain in good faith obligates it to furnish such information to the Unions even though it maintains that it has investigated the applicants for AGCC's open-shop membership classifications and has ascertained that those admitted to such memberships were not covered by any subsisting collective-bargaining agreements. For, whatever the eventual merits of the Unions' claim that their contracts are being violated and their

bargaining units unlawfully diminished, they are entitled to the requested information under the "discovery-type" standard enunciated in N.L.R.B. v. Acme Industrial Co., 385 U.S. at 437, to judge for themselves whether to press their claims in the contractual grievance procedure, or before the Board or courts, or through remedial provisions in the contracts under negotiation. The Torrington Company v. N.L.R.B., 545 F.2d 840 (2d Cir. 1976). It is certainly well within the statutory responsibilities of the Unions to scrutinize closely all facets relating to the diversion or preservation of bargaining unit work and, therefore, they are fully warranted in any reasonable probing of data concerning the exclusion of the

employees of certain AGCC members from the bargaining units.[10]

On the basis of the facts and circumstances set forth above, we conclude that the information sought by the Unions was relevant and necessary to their administration of the contracts between them and the AGCC, to the intelligent assessment of the advisability of filing grievances or taking other remedial action, and to the formulation of related collective-bargaining proposals in the then-pending negotiations.

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[10] N.L.R.B. v. Rockwell-Standard Corporation, Transmission and Axle Division, Forge Division, 410 F.2d 953, 957 (6th Cir. 1969); Curtiss-Wright Corporation v. N.L.R.B., supra.

As, in our view, the relevancy of the requested information was established at the hearing,[11] there was no justification for the Administrative Law Judge's conjecture that the Unions' underlying purpose was to facilitate the organizing of nonunion companies. Even assuming, arguendo, that the Unions also desired the requested information for such organizational use, it is well established that, where a union's request

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[11] Even assuming, arguendo, that the information sought was not otherwise "presumptively relevant" to the Unions' representation of the unit employees under the "discovery-type" standard of N.L.R.B. v. Acme Industrial Co., supra, it has been clearly established on the record here that such information was in fact relevant and necessary in connection with the particular matters then in dispute between the Unions and Respondent.

for information is for a proper and legitimate purpose, it cannot make any difference that there may also be other reasons for the request or that the data may be put to other uses. Utica Observer-Dispatch, Inc. v. N.L.R.B., 229 F.2d 575 (2d Cir. 1956).

Accordingly, we find that Respondent's refusal to furnish the information requested by the Unions was violative of Section 8(a)(5) and (1) of the Act.

The Remedy

Having found that Respondent engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

Accordingly, Respondent will be ordered, upon request, to furnish the Unions with the requested information hereinbefore found relevant and necessary to both contract administration and contract negotiation; specifically, Respondent's full membership roster, including the portion which contains the names and addresses of its open-shop and open-shop specialty members. Said roster shall be supplemented by periodic notifications of additions and deletions which shall be given with the same frequency as Respondent has heretofore followed in notifying the Unions of modifications in its roster of regular, specialty, and joint-venture members.

Conclusions of Law

1. Respondent, Associated General Contractors of California, is an

employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. 46 California Counties Carpenters Conference Board, United Brotherhood of Carpenters & Joiners of North America, AFL-CIO, and Northern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. By refusing to furnish the above-named Unions with information necessary and relevant to their administration and negotiation of collective-bargaining agreements with Respondent, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Associated General Contractors of California, San Francisco, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with 46 California Counties Carpenters Conference Board, United Brotherhood of Carpenters & Joiners of North America, AFL-CIO, and Northern California District Council of Laborers,

Laborers' International Union of North America, AFL-CIO, by refusing to supply relevant information upon request.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Furnish, upon request, to said Unions its full membership roster including the portion that lists the names and addresses of its open-shop and open-shop specialty members, as periodically supplemented in the manner provided in "The Remedy" section of this Decision.

(b) Post at its offices, and at the offices of all its employer-members, copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent and by each of its employer-members immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employer-members employees are

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[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

customarily posted. Reasonable steps shall be taken by Respondent and its employer-members to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. June 8, 1979.

John A. Pennelo, Member

Betty Southard Murphy, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with 46 California Counties Carpenters Conference Board, United Brotherhood of Carpenters & Joiners of North America, AFL-CIO, or Northern California District Council of Laborers, Laborers' International Union of North America, AFL-CIO, by refusing, upon request, to furnish information necessary and relevant for the Unions' use in policing, administering, and negotiating collective-bargaining agreements between us and the Unions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the excise of the rights guaranteed in Section 7 of the Act.

WE WILL, upon request, furnish the aforesaid Unions with copies of our full membership roster.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

(Employer)

Dated_____

By_____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 13018, 450 Golden Gate Avenue, San Francisco, California 94102, Telephone 415-556-0335.

JD-(SF)-81-78
All California, Exclusive
of San Diego County.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGE
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

and Case No. 20-CA-12355

46 CALIFORNIA COUNTIES CARPENTERS CONFERENCE BOARD, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF NORTH AMERICA, AFL-CIO

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA

and Case No. 20-CA-12497

NORTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO

Patricia S. Radez and David F. Sargent, for the General Counsel.
Victor J. Van Bourg and Michael B. Roger, San Francisco, Calif., for the Charging Parties.
Lawrence H. Kay, Sacramento, Calif., for Respondent.

DECISION

Statement of the Case

DAVID G. HEILBRUN, Administrative Law Judge: This case was heard during January 1978, in San Francisco, California, based on a consolidated complaint alleging that Associated General Contractors of California, called Respondent, has refused to furnish certain requested information which is assertedly relevant to the performance of duties as exclusive collective bargaining representative for employees working in construction trades as carpenters and laborers by 46 California Counties Carpenters Conference Board, United Brotherhood of Carpenters & Joiners of North America, AFL-CIO, called Carpenters, and Northern California District Council of Laborers, Laborers'

International Union of North America, AFL-CIO, called Laborers, respectively, and has thereby violated Section 8(a)(1) and (5) of the Act.

Upon the entire record, my observation of witnesses, and consideration of post-hearing briefs, I make the following:

Findings of Fact and Resultant Conclusion of Law

Respondent is a trade association primarily representing contractors, and to a lesser extent other firms allied with the construction industry.[1]

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[1]Respondent, a voluntary association of California employers engaged in the building and construction industry, maintains its principal headquarters in Sacramento, California. In the course and conduct of annual

[Footnote continued on page 4]

Reflecting a lengthy collective-bargaining relationship with numerous unions, Respondent is currently party to 3-year contracts with the Carpenters and Laborers which succeeded agreements bearing a June 15, 1977 expiration date. Respondent classifies its members as regular, open shop, joint venture, honorary, specialty, limited speciality, open shop speciality and affiliate. Non-open shop members are bound expressly

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[Footnote continued from page 3]

business operations by Respondent's employer-members, goods and materials valued aggregately in excess of $50,000 were purchased and received directly by such employer-members from suppliers located outside California. I find Respondent to be an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that Carpenters and Laborers are each labor organizations within the meaning of Section 2(5).

or by clear implication to at least two collective-bargaining agreements by virtue of documentation executed during the application process. The application form used to initiate either type of open shop membership is silent on the subject of collective bargaining. Open shop became an organic category of membership in 1972.

This case spins off a nationally manifesting phenomenon that is broadly termed the open shop movement. Several theories are held as to impetus, status, and prospects for this subject. It is variously attributed to a push for minority employment in the domestic construction industry, reportedly prohibitive costs of bidding with anticipation of employing union labor, entry of non-traditional employees into the field,

and changing ethics among those aspiring to be construction workers. The subject is of at least decade-long evolution as indicated by trade journal articles of the late '60's. "Open Shop Group Urges Labor Changes," Engineering News-Record, 10/24/68, p. 81 reported the 11th Annual Convention of the Associated Builders and Contractors, Inc. (ABC), the national association of merit (open shop) contractors, as then claiming 2300 member firms in 18 states. The following year brought "The Open Shop Voice Grows Loud and Clear," Engineering News-Record, 11/27/69, pp. 44-46 reporting growth of ABC to 200 Chapters and the AGC's "first national open shop conference," one "publicly recognizing the fact that 35 percent of its 9,000 members operate open shop." During an address to

the Sheet Metal and Air-Conditioning Contractors' National Association, Edward J. Carlough, President of Sheet Metal Workers International Association, AFL-CIO, proposed attitudinal changes, elimination of jurisdictional disputes, and wage scale realism in the context of slackened competitive position of union contractors and curtailed employment opportunities for members of his labor organization. "Contractor Relations on Upgrade: Union Seeks 'Drastic Changes' to Compete Against Open Shops," Air Conditioning, Heating & Refrigeration News, 11/8/76, pp. 5-6. The passage of time has simply heightened awareness of this subject, as illustrated by the feature cover story updating status of open shop or double-breasted operations, which were thought to now constitute a

"majority of all construction in the U.S." "Open Shop Construction Keeps Growing Bigger, Getting Stronger," Engineering News-Record, 10/27/77, pp. 20-24.

Over the years following 1972, Respondent nurtured open shop activity in two chief ways. It unabashedly sponsored public programs on open-shop operations, and endorsed detailed written materials that had been prepared on the subject. In a separate vein, Respondent pressed the California Department of Industrial Relations to approve a "non-traditional" apprenticeship program for the development of multi-skilled, generically titled "construction workers." Consistent with this general theme, Respondent furnished the Union a bound membership directory styled "Membership Roster for Collective

Bargaining Purposes," in which neither open shop nor open shop specialty members were listed. As these dynamics unfolded over several years, various formal and informal communications passed between Respondent and signatory unions of this litigation. Victor Van Bourg, attorney for the Carpenters, was advised during negotiations for the 1974-77 contract that open shop classifications existed; a communication that resulted in side letter dated August 14, 1974, which addressed the issue. For the Laborers, their business manager Sal Minerva testified that he did not become aware of the distinction until 1975. Van Bourg (otherwise also ad hoc counsel to the Laborers) filed a United States District Court action in February 1975 in which the Carpenters, as plaintiff, alleged

exploitation of open shop principles by Respondent in conspiratorial fashion warranting damages (provable, trebled and exemplary) totaling $825,000,000. This action is pending before the Ninth Circuit, on appeal from dismissal. As end of the 1974-77 contract period neared, both unions made unequivocal request for disclosure of all open shop members, pressing a position that representation of such class of members by Respondent would be violative "of law and our Agreement." This was declined both by inaction and concurrent dialogue in which officials of Respondent made known their intention to keep the open shop roster confidential. These charges followed in January 1977.

It is fundamental to any application of the "relevant and neces-

sary" doctrine relating to disgorgement of employer-controlled information that the bargaining unit(s) involved be clearly known. Here the consolidated complaint originally vaguely pleaded unit in terms of "certain employer-members" employing persons in applicable craft work. This phraseology, amended before imminent close of hearing, seems traceable to the original charges, in which no more descriptive statement was made than one referred to collective bargaining agreements entered into "on behalf of [Respondent's] affiliate members." In fact, a recognition clause with gradations of clarity between the two descriptions exists in both

agreements.[2] In the order of Carpenters and Laborers, they read:

> EMPLOYER MEMBERSHIP
>
> This Agreement shall be binding upon each and every regular, specialty and joint venture member of the Employer [expressly recognized elsewhere by the Union as the sole and exclusive bargaining representative for their respective members, present and future,

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[2]For these purposes, the perfect carryover of language from the 1974-77 contracts to those now extant makes delineation between the two periods of time unnecessary.

who are or hereafter become members] performing work under this agreement with the same force and effects as if this Agreement were entered into by each such member individually. All such members of the Employer shall be and remain liable under this Agreement for and during the term hereof, irrespective of whether such members shall resign from the Employer prior to the expiration date of this Agreement, and

such liability shall be deemed to have survived the termination of said membership and remain in force for and during the term of this Agreement . . . . (SECTION 6.)

* * * * *

Union's Recognition of Collective Bargaining Representative of Employer

The Union hereby recognizes and acknowledges that the Collective Bargaining Representative of Employer includes in its membership a majority of the individual employers in

the highway, general building and heavy construction industry, and said individual employers are performing the greater percentage of work therein. By reason of such facts the Union hereby recognizes that the Collective Bargaining Representative of the Employer, as hereinabove referred to, is the collective bargaining representative for all persons, firms, or corporations who are now or hereafter may become

members of any employer organization that is now or hereafter and may be signatory or bound hereto of any individual employer who is not a member of any such employer organization, and who is or hereafter may be listed on a membership list or roster or becomes signatory hereto with respect to highway, general building and heavy construction industry in the territory subject to this Agreement. (Section 2A.)

The recognition clause of the Carpenters' Agreement beggars extensive comment. It is expressly limited to three classifications of AGC membership, each of them commonly viewed within the industry and otherwise of plain meaning. The language is harmonious with established membership processing, particularly insofar as Respondent entertains applications, classifies members and establishes dues formulae. As to dues, a basic approach of minimums and maximums obtains, within which actual calculations of payment is based on volume of business done, "labor

over-ride,"[3] and special provisions applicable only to joint ventures and affiliates.[4] The dues patterns that pertain to specialty, limited specialty and open shop specialty members are similar to their broader counterparts. Cost of membership for the first two is a minimum plus hourly-based labor

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[3]The labor over-ride facet of membership dues is for regular members "1-1/2 cents per hour for each man-hour worked . . . under bargaining agreements negotiated by [AGC]," and for open-shop members $2 per month "for each jobsite employee [working 50 or more hours] in any one month."

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[4]The previously-discussed side letter, forming an integral part of the Carpenters' former contract, states, inter alia: "Sections 6 and 9 (Liability of the Parties) of the newly-negotiated Agreement shall be interpreted as applying only to Regular, Specialty and Joint Venture members of your Association."

over-ride; that for the third category of open shop specialty is volume based with a minimum. From this no ambiguity remains and scope of the Carpenters' contract is properly thought of as being coextensive with the three membership classes, each of which is fully set forth in the "for collective bargaining purposes" roster and periodically updated in reasonable manner.

Substantially more analysis is required to fathom just what the recognition clause of the Laborers' contract covers by intent and effect. Syntactically abstruse, of convoluted composition, and at points simply undecipherable, the two sentences comprising Section 2A cannot yield any

sure meaning.[5] The oddness of phrasing is first noticed in the term "Collective Bargaining Representative of Employer" (presumably attemptedly reiterated in the same sentence by unexplainable addition of definite article "the"). This quoted term is memorialized in the agreement as the object of the Laborers' fundamental recognitional act for purposes of labor-

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[5]This characteristic is not without some analogy to the reported situation of General Counsel declining to issue complaint against Associated General Contractors of California, Respondent here, when it unilaterally modified subcontracting phraseology of master labor agreements which were unlawful on their face under Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, a step protested by the filing of unfair labor practice charges by various labor organizations including Eleven Southern California Conference of Carpenters, counterpart for much of the rest of California as Carpenters here. NLRB Gen. Couns. Ad. Mem. No. 31-CA-6315 (1977), 95 LRRM 1540.

management dealings. The section continues with an awkward binding of employers "signatory or [hereafter] bound" plus those "listed on a membership list or roster," termed in context of "any employer organization [emphasis supplied]." The essential vice in General Counsel's case here is that open shop members are specifically not bound to contracts, nor are they within the intendment of a membership listing when done expressly not for collective bargaining purposes. It would distort common meaning of association bargaining practices were the open shop firms to be considered within the Laborers' bargaining unit when a sophisticated agency relationship is rooted just oppositely. For this reason I decline to hold that such dissembled phraseology serves to

bind all Respondent's members to the Laborers' contract.

The unions' quarrel with Respondent is essentially one to be handled in the organizational forum, a point that has received belated recognition at the highest levels with extensive publicity of the very fact that California becomes a target area for the effort. "The Building Trades Find Teamster Allies," Business Week, February 27, 1978. Respondent's choice of creating and fostering its open shop division is an institutional matter; one that differs not in principle from the controversial establishment several years ago of coalition bargaining as a technique believed beneficial to overall goals of the union movement. While disclosure of the open shop roster would

well assist these charging parties, plus their higher affiliates, in research and strategy planning, it cannot be said they have that entitlement under doctrine of whether certain information is relevant and necessary to fulfillment of a representational role. To grant this would smack of participating in the notorious "top down" mode of organizing employees. Additionally, the ease of corporate restructuring and quasi-multiple use of contractor registration procedures are legislative concerns within the state's jurisdiction, or well suited to adjudications under NLRA Section 301. In the same sense, unsuccessful efforts to legitimatize a non-traditional apprenticeship program does not weigh against Respondent. The unions complain of imperfection

in Respondent's ability to advise of regular Southern California members operating temporarily north of defined jurisdictional boundary, and of unnecessary exposure to, or practically entrapment with, unintended Section 8(b)(7) proceedings. The answer here is still more compellingly that labor organizations must accept minimal responsibility for their organizational needs, and improper conduct resulting in CP charges invariably follows some introductory communication with the affected employer. Cf. Bldg. and Const. Trades Council of Fond Du Lac County, 168 NLRB 606; Hoffman v. IATSE, Local 611, 81 LRRM 2759. Convenience is not equitable with necessity, and both Carpenters and Laborers are essentially unimpeded in their function as party to

construction industry contracts that relate only to Respondent's major traditional arm. Cf. Local 13, Detroit Newspaper Printing Union, 233 NLRB No. 144. Only a latent validity is present in the unions' protest. Their basic failing is to have yet secured language within protest. Their basic failing is to have yet secured language within the collective-bargaining agreements that adequately identifies types of employers for whom they enjoy recognition. When and if such a point is reached, it would then be timely to address the basic issue here in terms of a right to tangible extrinsic information about other facets of Respondent's organizational structure. General Counsel's brief artfully traces the settled principles of disclosure where

presumptive, probable, or potential relevance is legitimately shown. In the last analysis, the case becomes one of whether non-union construction firms may purchase the administrative and promotional services of an industry support mechanism, without further entanglements stemming from a separately existing labor relations function. I believe a negative answer would overreach to the detriment of basic Section 7 rights as preserved to employees.

Accordingly, I render a conclusion of law that Respondent has not violated the Act as alleged, and issue

the following recommended:[6]

ORDER

The complaint be dismissed in its entirety.

Dated: April 7, 1978.

/s/
David G. Heilbrun
Administrative Law Judge

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[6]In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX E

STATUTES RELEVANT TO THIS PETITION

1. Section 10(e), National Labor Relations Act:

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the

court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the

record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial

evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

2. Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act:

(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).